Office-Supreme Court, U.S.
FILED
DEC 17 1965
JOHN F. DAVIS, CLERK

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 691

LIGGETT & MYERS TOBACCO COMPANY,
Petitioner,

v.

ANITA PRITCHARD, Administratrix of the Estate of Otto E. Pritchard, Deceased,
Respondent.

PETITIONER'S REPLY BRIEF

BETHUEL M. WEBSTER
DONALD J. COHN
One Rockefeller Plaza
New York, New York 10020

WILLIAM H. ECKERT
1000 Porter Building
Pittsburgh, Pennsylvania 15219
Counsel for Petitioner

FRANCIS K. DECKER, JR.
WEBSTER SHEFFIELD FLEISCHMANN
HITCHCOCK & CHRYSTIE
One Rockefeller Plaza
New York, New York 10020

JOHN H. MORGAN
ECKERT, SEAMANS & CHERIN
1000 Porter Building
Pittsburgh, Pennsylvania 15219
Of Counsel

December 16, 1965

Table of Citations

Cases	Page
Hormel v. *Helvering*, 312 U. S. 552 (1941)	2
Silber v. *United States*, 370 U. S. 717 (1962)	2
United States v. *Atkinson*, 297 U. S. 157 (1936)	2
Woodworkers Tool Works v. *Byrne*, 191 F. 2d 667 (9th Cir. 1951)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 691

LIGGETT & MYERS TOBACCO COMPANY,
Petitioner,

v.

ANITA PRITCHARD, Administratrix of the Estate of Otto E. Pritchard, Deceased,
Respondent.

PETITIONER'S REPLY BRIEF

Although dated November 5, 1965, respondent's Brief in Opposition was not served on petitioner's counsel until December 1, 1965. Thus, this Reply Brief is timely.

The first sentence of respondent's Brief in Opposition is inaccurate and misleading and sets the tone of the entire brief. The Questions Presented by Petitioner most certainly do raise the issue that the Court of Appeals was clearly wrong in finding error in the Trial Court's instructions.

Rule 23(c) of this Court's Rules requires the Questions Presented to be stated "without unnecessary detail" and deems presented all subsidiary questions "fairly comprised therein".

Question 2 in the Petition states:

> "2. If a 'plain error' exception is to be engrafted on Rule 51 despite its unambiguous and mandatory language, what are the criteria for the application of such an exception, and is this a proper case for its application?" (p. 2).

Whether this is a "proper case" for application of a "plain error" exception to Rule 51, if one exists, certainly comprises the issue whether there was error at all. As pointed out at pages 15-20 of the Petition, the Third Circuit's holding was clearly erroneous.

The cases respondent cites for support of the Third Circuit's position are completely irrelevant. Petitioner contends that there is no plain error exception to Rule 51, not that plain error does not apply to Federal Civil Trials. See note on p. 13 of Petition. Ignoring that clear statement, respondent attempts to avoid or confuse this clear issue by discussing plain error generally and not with regard to Rule 51. Neither *Hormel* v. *Helvering,* 312 U.S. 552 (1941), nor *Silber* v. *United States,* 370 U.S. 717 (1962), cited by respondent, had anything to do with instructions. In both cases, new substantive theories of law were raised on appeal. As pointed out in the Petition, this Court has refused to consider alleged error in instructions not raised below. See pp. 9-10 of Petition.

Respondent's attempt to show that *United States* v. *Atkinson,* 297 U.S. 157 (1936), has been resurrected in civil cases after adoption of the Federal Rules of Civil Procedure is patently wrong. *Silber* was a criminal case which specifically relied on Rule 52(b) of the

Federal Rules of Criminal Procedure. The discussion at pages 12-14 of the Petition need not be repeated.

Finally, respondent apparently has not read *Woodworkers Tool Works* v. *Byrne,* 191 F.2d 667 (9th Cir. 1951), which is an "instance" where a Court of Appeals affirmed a verdict below despite error in the instructions because no objection was made. Respondent's present assertion that there were glaring errors in the instructions is belied by his complete unawareness of or silence about such alleged errors not only at trial but also on appeal.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BETHUEL M. WEBSTER
DONALD J. COHN
One Rockefeller Plaza
New York, New York 10020

WILLIAM H. ECKERT
1000 Porter Building
Pittsburgh, Pennsylvania 15219

Counsel for Petitioner

FRANCIS K. DECKER, JR.
WEBSTER SHEFFIELD FLEISCHMANN
HITCHCOCK & CHRYSTIE
One Rockefeller Plaza
New York, New York 10020

JOHN H. MORGAN
ECKERT, SEAMANS & CHERIN
1000 Porter Building
Pittsburgh, Pennsylvania 15219
Of Counsel

Dated: December 16, 1965